

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Michael Kubayanda, Chairman;
Ashley E. Poling, Vice Chairwoman;
Mark Acton;
Ann C. Fisher; and
Robert G. Taub

First-Class Mail and Periodicals
Service Standard Changes, 2021

Docket No. N2021-1

ORDER AFFIRMING PRESIDING OFFICER'S RULING NO. N2021-1/9

(Issued May 26, 2021)

I. INTRODUCTION

This Order concerns how discrete subparts should be counted for purposes of the 25-interrogatory limit as set forth in 39 C.F.R. § 3020.117(a). In response to an objection by the Postal Service to Mailers Hub's interrogatories and a subsequent answer by Mailers Hub,¹ the Presiding Officer issued Presiding Officer's Ruling No. N2021-1/9, which excused the Postal Service from answering the propounded

¹ Motion of the United States Postal Service to be Excused from Responding to Interrogatories Propounded by Mailers Hub, and for Related Relief (MH/USPS-T1-1-16; MH/USPS-T2-1-3; and MH/USPS-T3-1-6), May 17, 2021, at 1 (Postal Service Motion); Answer of Mailers Hub to United States Postal Service Motion to be Excused from Responding to Interrogatories (MH/USPS-T1-1-16; MH/USPS-T2-1-3; MH/USPS-T3-1-6), May 18, 2021 (Mailers Hub Response).

interrogatories.² However, the Presiding Officer reviewed the interrogatories, identified 49 lines of questioning, and ordered Mailers Hub to select no more than 25 interrogatories from the list to propound on the Postal Service by May 20, 2021. POR No. 9 at 3-4.

On May 21, 2021, the Postal Service filed a motion to certify POR No. 9 to the Commission on the question of whether the 25-interrogatory limit and the standard for non-discrete questions should be informed by federal courts' practice and the application of case law to distinguish and count interrogatories.³ On May 24, 2021, the Presiding Officer certified the questions raised by the Postal Service to the full Commission for its consideration and disposition.⁴

For the reasons discussed below, the Commission affirms POR No. 9. However, in balancing the time constraints and the burden on the Postal Service with providing the opportunity for Mailers Hub to meaningfully participate in the proceeding, the Commission finds that the Postal Service may treat certain interrogatories as requests for admission pursuant to 39 C.F.R. § 3020.119.

II. BACKGROUND AND PROCEDURAL HISTORY

On April 21, 2021, the Postal Service filed a request for an advisory opinion from the Commission regarding planned changes to the service standards for First-Class Mail and end-to-end Periodicals.⁵ Discovery for parties intervening in the proceeding

² Presiding Officer's Ruling on United States Postal Service's Motion to be Excused from Responding to Interrogatories Propounded by Mailers Hub, and for Related Relief, May 19, 2021 (POR No. 9).

³ Motion of the United States Postal Service to Certify Presiding Officer's Ruling No. N2021-1/9 to the Commission, or for Clarification of Such Ruling, and for Related Relief, May 21, 2021, at 4 (Motion to Certify).

⁴ Presiding Officer's Ruling Certifying Presiding Officer's Ruling No. N2021-1/9 to the Commission, May 24, 2021, at 3 (POR No. 10).

⁵ United States Postal Service Request for an Advisory Opinion on Changes in the Nature of Postal Services, April 21, 2021, at 1 (Request).

ensued.⁶ On May 5, 2021, Mailers Hub filed a notice of intervention in this proceeding, and on May 12, 2021, Mailers Hub propounded interrogatories on three Postal Service witnesses.⁷

On May 17, 2021, the Postal Service moved to be excused from responding to the interrogatories on the basis that they exceed the 25-interrogatory limit imposed by 39 C.F.R. § 3020.117. Postal Service Motion at 1. The Postal Service argued that the Commission expressly adopted the practice of federal courts which operate under Rule 33 of the Federal Rules of Civil Procedure (FRCP) as to the counting of discrete subparts. *Id.* at 3. The Postal Service explained that “regardless of how questions may formally be grouped in a single paragraph or even a single sentence, they must relate, in a more than attenuated or tangential fashion, to a common theme and be incapable of independent answers.” *Id.* at 7. In evaluating Mailers Hub’s interrogatories, the Postal Service found that Mailers Hub propounded at least 161 separate interrogatories. *Id.* at 24-25. The Postal Service argued that answering these interrogatories would be unduly burdensome, would vitiate the Commission’s 25-interrogatory limit, and it could not divine which 25 interrogatives would be most appropriate for it to answer.⁸

In response, Mailers Hub asserted that it made a good faith effort to comply with the rule and that the Postal Service takes an inappropriately narrow view of the rule. Mailers Hub Response at 2-3. It contended that the Postal Service had parsed the propounded interrogatories in an overly-technical way, and that “[w]here parties have acted in good faith to comply with the limit and the subparts of the interrogatory help

⁶ Notice and Order on the Postal Service’s Request for An Advisory Opinion on Changes in the Nature of Postal Services, April 23, 2021, at 13-14 (Order No. 5875).

⁷ Notice of Intervention Mailers Hub, May 6, 2021, at 1; Mailers Hub Interrogatories and Requests for Production of Document United States Postal Service Witness Robert Cintron (MH/USPS-T-1-1), May 12, 2021; Mailers Hub Revised Interrogatories and Requests for Production of Document United States Postal Service Witness Curtis Whiteman (MH/USPS-T-2-1), May 12, 2021; Mailers Hub Revised Interrogatories and Requests for Production of Document United States Postal Service Witness Stephen B. Hagenstein (MH/USPS-T-3-1), May 12, 2021.

⁸ *Id.* at 25. The Postal Service also requested that it be allowed the opportunity to submit motions to be excused on grounds other than numerosity if the motion is denied in part and any number of Mailers Hub’s existing interrogatories sustained. *Id.*

clarify the information sought and can reasonably be construed to factually and logically relate to a single, discrete topic, the Commission should treat the interrogatory as a single interrogatory for the purposes of Rule 3020.117.” *Id.* at 4. Moreover, Mailers Hub stated that, although it is reasonable to look to federal court precedent as a guide to construing Rule 3020.117(a), the Commission is not bound to strictly apply that precedent. *Id.*

On May 19, 2021, the Presiding Officer granted the Postal Service’s Motion, finding that the propounded interrogatories, including discrete subparts, clearly exceed the 25-interrogatory limit. POR No. 9 at 3. However, given the late stage of discovery and in the interest of the orderly conclusion of the discovery period, the Presiding Officer reviewed Mailers Hub’s interrogatories and identified 49 discrete lines of questioning. *Id.* The Presiding Officer ordered Mailers Hub to select no more than 25 interrogatories from the list of the identified lines of questioning to propound on the Postal Service by May 20, 2021. *Id.* at 4-5. The Presiding Officer noted that many of Mailers Hub’s questions could be expressed as requests for admission pursuant to 39 C.F.R. § 3020.119. *Id.* at 3-4, n.7. The Presiding Officer also ordered the Postal Service to file any motion to be excused from answering the interrogatories by May 21, 2021. *Id.* at 5. In response to POR No. 9, Mailers Hub selected 25 interrogatories from the list.⁹

III. MOTION TO CERTIFY & POR NO. 10

On May 21, 2021, the Postal Service filed a motion to certify POR No. 9 to the Commission, contending that Mailers Hub should be permitted to select and propound

⁹ Mailers Hub Response to Presiding Officer’s Ruling N2021-1/9, May 20, 2021. Mailers Hub also propounded revised interrogatories on the Postal Service. See Mailers Hub Revised Interrogatories and Requests for Production of Document United States Postal Service Witness Robert Cintron (MH/USPS-T-1-1), May 20, 2021; Mailers Hub Revised Interrogatories and Requests for Production of Document United States Postal Service Witness Curtis Whiteman (MH/USPS-T-2-1), May 20, 2021; Mailers Hub Revised Interrogatories and Requests for Production of Document United States Postal Service Witness Stephen B. Hagenstein (MH/USPS-T-3-1), May 20, 2021.

25 interrogatories constituting separate questions calling for independent consideration and answer, rather than selecting 25 “lines of questioning.” Motion to Certify at 1.

The Postal Service explains that federal courts applying a functionally identical standard have found that the standard leaves open questions of what constitutes a “primary question,” when subparts are or are not “logically or factually subsumed within” it, and when they are “necessarily related to” it. *Id.* at 2.

The Postal Service does not challenge the Presiding Officer’s general approach of allowing Mailers Hub to choose up to 25 interrogatories from a list, given the late stage of discovery. *Id.* at 3. Rather, the Postal Service challenges “only the (admittedly implied) position that an ‘interrogatory,’ for purposes of Rule 3020.117(a)’s limit, consists of a ‘discrete line[] of questioning’ ‘by topic,’ rather than a discrete question regardless of topic.” *Id.* at 3 (citing POR No. 9 at 3) (emphasis omitted).

The Postal Service provides several examples of single interrogatories that it believes contain multiple interrogatories. *Id.* at 5-10. The Postal Service also provided an example of an interrogatory that arguably merits treatment as a single interrogatory. *Id.* at 5. It states that rigorous application of case-law principles would show the 25 “lines of questioning” contains as many as 84 distinct questions. *Id.* at 10. The Postal Service notes that even a conservative approach would yield no less than 45 distinct questions. *Id.* at 10, n.7.

The Postal Service requested that the Presiding Officer either clarify that POR No. 9 intends to permit Mailers Hub to select 25 distinct questions (as opposed to 25 lines of questioning) or certify the appeal of POR No. 9 to the Commission. *Id.* at 24-25. The Postal Service presented two questions for Commission review concerning (1) whether the 25-interrogatory limit and the standard for non-discrete questions should be informed by the federal courts’ practice; and (2) whether the application of case law requires a more substantive approach to distinguishing and counting interrogatories than POR No. 9’s emphasis on general topics and “discrete lines of questioning.” *Id.* at 4.

The Postal Service argued that the answer to both questions is yes and that POR No. 9 requires modification such that Mailers Hub may choose 25 questions, “not 25 variously numerous groups of separate questions.” *Id.* The Postal Service also requested that the Presiding Officer stay the deadline for responding to any Mailers Hub interrogatories until a reasonable time following resolution of any appeal under Rule 3010.107(b)-(c). *Id.* at 25.

On May 24, 2021, the Presiding Officer certified the questions raised by the Postal Service Motion to the Commission for its consideration and disposition. POR No. 10 at 3. In addition, the Presiding Officer stayed the deadline for the Postal Service to respond to Mailers Hub’s selected interrogatories until the Commission issues its order. *Id.*

IV. COMMISSION ANALYSIS

Rule 3020.117(a) establishes the 25-interrogatory limit and states that “[a]n interrogatory with subparts that are logically or factually subsumed within and necessarily related to the primary question will be counted as one interrogatory.” 39 C.F.R. § 3020.117(a). Two questions raised by the Postal Service Motion have been certified to the Commission for disposition:

1. Are the 25-interrogatory limit and the standard for non-discrete questions under Rule 3020.117(a) to be informed by federal courts’ practice under parallel standards, as Order No. 2080 indicated that they should?
2. If so, then does the application of case law require a more substantive approach to distinguishing and counting interrogatories than POR No. 9’s emphasis on general topics and “discrete lines of questioning” (with multiple independent questions under each “line”)?

Motion to Certify at 4; POR No. 10 at 3. The Commission finds that the answer to the first question is yes; however, the answer to the second question is no.

In 2014, the Commission adopted new procedures for nature of service proceedings (N-cases) that were intended to address the need for more timely completion of these proceedings.¹⁰ The Commission recognized that the most time consuming phase of N-cases had been the discovery phase. Order No. 2080 at 46. In adopting Rule 3020.117(a), the Commission stated that it sought to reduce the time and effort spent on formal discovery. *Id.* at 26. Specifically, the Commission's objective was to "facilitate the more timely issuance of advisory opinions while, at the same time, providing for the development of an adequate record for decision." *Id.*

The Commission concluded that a 25-interrogatory limit could contribute to the expedition of N-cases. *Id.* at 46. The Commission explained that, although it did not state the basis for selecting 25 as the appropriate limit, commenters correctly inferred that the Commission used the limit in FRCP Rule 33 that applies to federal courts as its model. *Id.* at 38. However, the Commission stated that several additional factors influenced the selection of an appropriate limit on interrogatories, including the availability of relevant information through means other than the service of formal interrogatories; the narrowed scope of the proceeding; the manner in which the limit is to be applied; and the availability of opportunities to exceed the limit. *Id.* at 39.

In addition, the Commission sought to prevent the 25-interrogatory limit from unfairly restricting the ability of participants to engage in discovery. *Id.* at 43. In discussing the criteria for determining whether subparts of interrogatories are to be counted toward the limit, the Commission's proposed rule provided that an "interrogatory with subparts that are logically *and* factually subsumed within and necessarily related to the primary question will be counted as one interrogatory." *Id.* at 43 (emphasis added). After reviewing comments that found that the "logically and factually related" premise was too restrictive, the Commission adopted a modified form of the rule such that an "interrogatory with subparts that are logically *or* factually subsumed within and necessarily related to the primary question will be counted as one

¹⁰ Docket No. RM2012-4, Order Adopting Amended Rules of Procedure for Nature of Service Proceedings Under 39 U.S.C. 3661, May 20, 2014, at 1 (Order No. 2080).

interrogatory””. *Id.* at 44 (emphasis added). The Commission stated that this formulation of the rule adopted the practice of federal courts which operate under FRCP Rule 33. *Id.* at 44. Thus, with regard to the Postal Service’s first question, the Commission finds that the Rule 3010.117(a) interrogatory limit and its standard for formulation is based on, and can be informed by, FCRP Rule 33 and federal court practices.

However, with respect to the second question, the Commission reminds the Postal Service that it is not bound by the FRCP or the practices in federal court. While the Commission may look to federal practice for guidance as to how the courts construe the language of FRCP Rule 33, rigid adherence to case law in Article III disputes that have various mechanisms for discovery not available in this proceeding (such as mandatory disclosures, depositions, etc.) would be impractical here, where there are limited opportunities for discovery, where there is a 90-day deadline, where parties may not be represented by counsel, and where resolution is by advisory opinion, not an adjudication of substantive rights. The purpose of these N-cases is to probe policy considerations and provide transparency to the public, with broad stakeholder participation, in a timely manner. Thus, “logically or factually subsumed” in the context of the Commission’s advisory N-cases may not necessarily be construed the same as “logically or factually subsumed” in an Article III context litigated in federal courts.

To be clear, the Commission evaluates these questions (and whether they are distinct) on a case-by-case, and at times, an interrogatory-specific assessment, including whether the questions are topically-related, the expected burden and/or difficulty in answering, and the probative value of the question in relation to the overall case and policies of title 39.¹¹ In every case, the Commission must balance the policy

¹¹ Even in federal court practice, the task of counting interrogatories requires a case-specific and interrogatory-specific assessment. See, e.g., *Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co.*, 315 F.R.D. 191, 197 (E.D. Tex. 2016) (“deciding whether a subpart of an interrogatory is sufficiently ‘discrete’ to be regarded as a separate interrogatory will frequently depend on the particular circumstances of each case and may not always be answerable with complete confidence”); see also *Synopsys, Inc. v. ATopTech, Inc.*, 319 F.R.D. 293, 295 (N.D. Cal. 2016).

considerations related to expeditiousness against the public having an opportunity to meaningfully participate in these proceedings.

In this case, rigorous application of federal court case law principles is not warranted.¹² The topic-related limitations as demonstrated in the grouping of questions by the Presiding Officer in POR No. 9 strike an appropriate balance between limiting discovery to accommodate a compressed timeline (and the corresponding burden on the Postal Service) with the need for broad participation by the public. Particularly in this case where Mailers Hub is not represented by counsel, the Commission is mindful of not implementing unnecessarily complicated limitations to full public participation. Here, the questions identified by the Presiding Officer, and those later chosen by Mailers Hub, are reasonably condensed by topic into 25 discrete interrogatories, mostly seeking details concerning statements on specific pages of certain witness testimony. Moreover, as the Presiding Officer noted, some of the questions that seek confirmation of facts could also be expressed as requests for admission pursuant to 39 C.F.R. § 3020.119.

For these reasons, the Commission affirms POR No. 9. Accordingly, the Postal Service shall respond to Mailers Hub's interrogatories by June 1, 2021. Responding to the Postal Service's concerns about burden, however, the Commission finds that the Postal Service may treat Mailers Hub's interrogatories that seek confirmation of facts (*i.e.*, begin with "please confirm") as requests for admission pursuant to 39 C.F.R. § 3020.119, and the subparts to those interrogatories (*i.e.*, "if not confirmed, please explain") as an invitation to provide context for the denial rather than an interrogatory.¹³ The Commission reiterates its caution that, as a general matter, requests for admission and interrogatories "are not interchangeable procedures." Order No. 2080 at 49. In this instance, however, the Commission finds that this approach balances the need for

¹² Indeed, courts have rejected as unfair the "draconian approach of counting every subdivision of an interrogatory as a separate question." See, *e.g.*, *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 11 (D.D.C. 2004).

¹³ See, *e.g.*, MH/USPS-T1-2; MH/USPS-T2-2.

prompt resolution of the proceeding with providing Mailers Hub an opportunity to meaningfully participate in this proceeding, as well as acknowledging the Postal Service's claims of burden. Moreover, due to the close of discovery, the imminent deadlines for designations, the filing of rebuttal cases, and the upcoming hearing, the Postal Service must file any motion to be excused on other grounds by June 1, 2021.

V. ORDERING PARAGRAPHS

It is ordered:

1. The Commission affirms the Presiding Officer's Ruling No. N2021-1/9.
2. The Postal Service shall respond to Mailers Hub's interrogatories by June 1, 2021.
3. The Postal Service may treat interrogatories asking for confirmation as requests for admission, and where the response is not confirmed, the Postal Service may treat the denial as an invitation to provide context for the denial.
4. The Postal Service must file any motion to be excused from answering these interrogatories on other grounds by June 1, 2021.

By the Commission.

Erica A. Barker
Secretary